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No. 07-1363

In the Supreme Court of the United States

ARMANDO JIMENEZ VIRACACHA, ET AL., PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision of the Board of Immigration Appeals remanding a case to an immigration judge for additional proceedings that are prerequisites to the grant or denial of relief constitutes a "final order of removal" under 8 U.S.C. 1252(a).

2. Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that the lead petitioner failed to establish "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his asylum application.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 518 F.3d 511. The decisions of the Board of Immigration Appeals (Pet. App. 28a-32a) and the immigration judge (Pet. App. 11a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. The petition for a writ of certiorari was filed on April 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General—and, now, the Secretary of Homeland Security—may, in his discretion, grant asylum to an alien

who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). To satisfy that standard, the alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987). As with asylum, the applicant bears the burden of establishing that he is eligible for withholding of removal. 8 C.F.R. 1208.16(b), 1240.8(d).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum, or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence,"

that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include, *inter alia*, "[c]hanges in conditions in the applicant's country of nationality." 8 C.F.R. 1208.4(a)(4)(i)(A). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this Chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for

review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioners are natives and citizens of Colombia. Pet. App. 1a. Lead petitioner Armando Viracacha (petitioner) was admitted to the United States as a non-immigrant visitor in December 1998, and his wife and children (petitioners Irma Yolanda Jiminez, Eliana Maritza Jimenez, Maria Paula Jimenez, and Andres Felipe Jimenez) were admitted as non-immigrant visitors in December 2000. *Ibid.*[1] Each of them had permission to remain in the United States for only six months, and each remained in the United States beyond that authorized time. *Ibid.*

In September 2002, petitioner filed an asylum application. Pet. App. 16a. He claimed that he had been persecuted in Colombia by the Revolutionary Armed Forces of Colombia (FARC) and that he would be persecuted by the FARC if he returned to Colombia. *Id.* at 1a. An asylum officer determined that petitioner's asylum application was untimely and referred him to an immigration judge (IJ) for a removal proceeding. A.R. 1112-1113.

Before the IJ, petitioner conceded removability and sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-

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[1] This brief generally refers only to the lead petitioner, because the other petitioners' claims are entirely derivative of his claims for relief. See Pet. 8 n.5; Administrative Record (A.R.) 1064-1065; see also 8 U.S.C. 1158(b)(3)(A) and (B).

ment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 11a-12a. In support of his claims, petitioner explained that, with an estimated membership of 17,000 in 2002, FARC was the "largest and most active" guerilla group in Colombia. A.R. 639, 1063-1072. He alleged that FARC guerillas put a gun to his head and threatened to kill him and made threatening telephone calls to his home because of his and his stepfather's political activism. Pet. App. 14a, 22a. Petitioner also claimed that the threatening phone calls to his family continued after he left Colombia in December 1998. *Id.* at 14a. Petitioner alleged that he planned to visit the United States for three or four months, but stayed beyond that time because the peace process instituted by the then-President of Colombia did not bear fruit. *Id.* at 17a.

The IJ found petitioner removable as charged, denied his claims for asylum and protection under the CAT, and granted him withholding of removal. Pet. App. 11a-27a. The IJ first determined that each of the petitioners remained in the United States beyond the time authorized and that, therefore, they were "all subject to removal." *Id.* at 12a.

The IJ rejected petitioner's asylum claim as untimely. Pet. App. 16a-20a. He noted that petitioner "has not filed an application for asylum within one year of his arrival" in the United States, because he arrived in the United States in December 1998, but he did not file his application until September 2002, which was nearly four years later. *Id.* at 12a, 16a.

The IJ then held that petitioner had failed to demonstrate either "changed circumstances" or "extraordinary circumstances" to justify his untimely filing. Pet. App. 16a-20a. The IJ first rejected petitioner's contention

that he showed "changed circumstances"—specifically, a material change in conditions in Colombia—that justified his late filing, explaining that there was "no correlation between [petitioner's] decision to file" his asylum application and changes in conditions in Colombia. *Id.* at 18a. Indeed, the IJ observed, from the time petitioner should have filed his asylum application to the time he actually did, the civil war in Colombia continued, "the nature of the conflict did not change," and the "same administration remained in power." *Id.* at 19a-20a.

The IJ then rejected petitioner's contention that "extraordinary circumstances" excused his late filing. Pet. App. 18a. The IJ noted that "extraordinary circumstances" generally include significant factors in the applicant's personal circumstances or experience, such as mental or physical or legal disability, that would justify the delay in filing. *Ibid.*; see 8 C.F.R. 1208.4(a)(5). The IJ explained that petitioner did not claim any type of serious disability; he merely stated that "unnamed representatives suggested to him that he didn't have to apply for asylum" and that he decided only later to do so. Pet. App. 18a. Because that justification "pale[d] significantly" when "contrasted with the reasons or examples given in the regulations," the IJ concluded that petitioner failed to provide any "extraordinary circumstances" to justify his late filing. *Id.* at 18a-19a.

The IJ then granted petitioner withholding of removal, concluding that petitioner established "a clear probability of persecution [by the FARC] on account of political opinion." Pet. App. 22a. The IJ denied petitioner CAT protection, explaining that his past experiences do not "rise to the level of torture" and that any past mistreatment was not inflicted by the Colombian

government or with government acquiescence. *Id.* at 24a-25a.

4. The Board of Immigration Appeals (BIA) affirmed and remanded. Pet. App. 28a-32a.[2] It noted that petitioner "conceded that his application was filed beyond the 1-year filing deadline," and it "agree[d] with the Immigration Judge's determination that, based on the evidence of record, [petitioners] have failed to establish the existence of extraordinary or changed circumstances." *Id.* at 29a-30a & n.3. The BIA determined that the IJ applied the correct legal standard in assessing whether an exception to the one-year deadline was warranted, and that its own review of the record "indicate[d] that [petitioner] ha[s] failed to establish the existence of extraordinary or changed circumstances, since the time [petitioner] entered the United States until present." *Id.* at 31a n.5; see *ibid.* ("[W]e find that [petitioners] have not established to our satisfaction that they qualify for an exception to the 1-year deadline.").[3]

The BIA then "remanded" the case to the IJ "for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and for further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." Pet. App. 32a.

3. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-10a. The court first con-

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[2] Petitioner did not appeal the IJ's ruling regarding CAT protection, and that claim therefore is not before this Court.

[3] The BIA also rejected petitioner's contention that the IJ violated his due process rights in conducting his removal hearing. Pet. App. 31a-32a. The court of appeals also rejected that claim, *id.* at 10a, and petitioner does not renew it before this Court.

sidered whether the BIA had issued a "final order of removal," a prerequisite for its jurisdiction under 8 U.S.C. 1252(a)(1). Pet. App. 3a-5a. It acknowledged that the BIA "remanded to the IJ under 8 C.F.R. § 1003.1(d)(6) for a background check to ensure eligibility for withholding of removal," but it determined that the BIA's order was nonetheless "final" because "the only question within the judicial ken" on appeal "had been conclusively resolved," and "[e]verything that remained was a matter of administrative discretion." *Id.* at 3a-4a. The court next determined that there was an "order of removal," because both the IJ and the BIA found petitioners removable, even though they did not order removal. *Id.* at 4a-5a (citing 8 U.S.C. 1101(a)(47)(A)).[4]

The court of appeals then concluded that it lacked jurisdiction to consider petitioner's challenge to the BIA's conclusion that he failed to establish changed or extraordinary circumstances to justify his untimely asylum application. Pet. App. 5a-10a. The court explained that the INA specifically bars judicial review of such determinations: Although the INA "allows the agency to accept untimely [asylum] applications under certain circumstances," it also states that "'[n]o court shall have jurisdiction to review any determination of the [agency] under paragraph (2).'" *Id.* at 6a (first and third pairs of brackets in original) (quoting 8 U.S.C. 1158(a)(3)).

The court noted that the INA provides an exception to that bar to judicial review for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), but it rejected petitioner's contention that his petition raised a

[4] The court also determined that petitioners had Article III standing because "there are enough differences between asylum and withholding of removal to yield a live controversy." Pet. App. 5a-6a.

"question[] of law" within the meaning of 8 U.S.C. 1158(a)(2)(D). Pet. App. 6a-9a. The court determined that "both the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." *Id.* at 6a. And, the court explained, neither of the IJ's two conclusions—"that [petitioner] had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material"—raised a "question[] of law," because "[t]he first is a conclusion of fact and the second is an application of law to fact." *Ibid.* The court observed that if petitioner was correct that his challenge to the agency's fact-bound conclusion about timeliness raised a "question[] of law," then "every error an agency can make is in the end one of 'law,'" and the INA's various limits on judicial review would be "erased from the statute books." *Ibid.*

In the court's view, the INA's exception for "questions of law" "is limited to 'pure' questions of law—situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." Pet. App. 7a. It rejected petitioner's contention that 8 U.S.C. 1252(a)(2)(D) "authorizes judicial review of all 'mixed questions of law and fact,' including all applications of law to fact," "[b]ecause no administrative case can be decided without applying some law to some facts." Pet. App. 8a. The court thus concluded that "Section 1252(a)(2)(D) does not restore jurisdiction when, as in this case, the governing rules of law are undisputed." *Id.* at 10a.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to consider whether the Board of Immigration Appeals erred in concluding that petitioner failed to establish "extraordinary circumstances" or "changed circumstances" to justify the late filing of his asylum application. The question whether the courts of appeals retain jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the agency's decision that an asylum applicant failed to demonstrate "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his application is a recurring issue that has led to some disagreement among the courts of appeals and may warrant this Court's review in an appropriate case. This is not an appropriate case, however, because the court of appeals lacked jurisdiction on the separate ground that the BIA's decision was non-final; because the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenges to the denial of his request for asylum; and because resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) likely will not change the outcome of petitioner's case. Further review is therefore unwarranted.

1. Petitioner correctly notes (Pet. 13-14) that the federal courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the BIA's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum application. In addition to the Seventh Circuit, see Pet. App. 6a-10a; *Vasile* v. *Gonzales*, 417 F.3d 766, 768-769 (2005), the Second, Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held that such a claim normally does not raise

a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances)[5]; *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon- Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (changed or extraordinary circumstances).[6] Those courts have explained that a challenge to the BIA's determination that an alien did not establish "changed circumstances" or "extraordinary circumstances" "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of

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[5] Petitioner suggests (Pet. 15) that the Second Circuit has agreed with the Ninth Circuit, but that is incorrect. The Second Circuit noted in *Chen* that a claim (like petitioner's) that is "essentially a quarrel about [the IJ's] fact-finding" with respect to the one-year asylum deadline does not raise a "question[] of law," 471 F.3d at 330, and the Second Circuit expressly took issue with the Ninth Circuit's approach in *Liu* v. *INS*, 508 F.3d 716, 721 n.3 (2d Cir. 2007). See also Pet. App. 7a-8a.

[6] The First and Fourth Circuits have stated that a challenge to the BIA's conclusion that an asylum application was untimely generally is a fact-specific question that does not raise a "question[] of law." Those statements appear to be dicta, however, because neither case expressly considered a "changed circumstances" or "extraordinary circumstances" determination. See *Niang* v. *Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Mehilli* v. *Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005).

law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit, in contrast, has held that an alien's fact-specific challenge to the BIA's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (9th Cir. 2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[7]

2. That disagreement in the courts of appeals may warrant this Court's attention in an appropriate case. This is not an appropriate case, however, for three reasons.

a. First, this Court lacks jurisdiction to consider petitioner's claim because the court of appeals lacked jurisdiction to review the BIA's decision for the separate reason that it was non-final. Petitioner has invoked (Pet. 1) this Court's jurisdiction under 28 U.S.C. 1254, which authorizes the Court to review "[c]ases in" the courts of appeals. Under Section 1254, this Court has jurisdiction to review the merits of a case only if the court of appeals properly had jurisdiction to do so. See

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[7] Petitioner cites various cases (Pet. 17-26) addressing whether *other* types of claims (*i.e.*, claims other than challenges to "changed circumstances" or "extraordinary circumstances" determinations) raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Those cases, however, do not shed light on whether petitioner's claim raises a "question[] of law," because that inquiry depends on the type of claim at issue. See, *e.g.*, *Almuhtaseb*, 453 F.3d at 748 n.3.

Nixon v. *Fitzgerald*, 457 U.S. 731, 742-743 & n.23 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974). In this case, the court of appeals lacked jurisdiction over petitioner's petition for review, and this Court thus lacks jurisdiction over the petition for review as well.

The court of appeals' jurisdiction was invoked under 8 U.S.C. 1252, which authorizes the courts of appeals to review "final order[s] of removal" by petition for review so long as the petition for review is filed within 30 days of the final order of removal. 8 U.S.C. 1252(a)(1), (b)(1). Under 8 U.S.C. 1101(a)(47)(B), an order of removal becomes final "upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period" for appealing to the Board. As "jurisdictional statute[s]," those provisions "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968).

The BIA's decision was not a "final order of removal" because the BIA remanded the case for the completion of "identity, law enforcement, or security investigations or examinations, and further proceedings" to establish petitioner's eligibility for withholding of removal. Pet. App. 32a. In 2005, the Attorney General determined that, in light of national security concerns, an alien should not be granted relief from removal until the Department of Homeland Security completes an investigation of the alien's background, which includes criminal and intelligence indices checks. See *Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals*, 70 Fed. Reg. 4743-4744 (2005); see 8 C.F.R. 1003.1(d) (codifying this rule). The Attorney General explained

that the background investigation must be completed "*prior to the granting* of * * * withholding of removal." 70 Fed. Reg. at 4746 (emphasis added). Moreover, he stated that, "[i]n any case that is remanded to the immigration judge pursuant to § 1003.1(d)(6), the Board's order will be an order remanding the case and *not a final decision*, in order to allow DHS to complete or update the identity, law enforcement, and security investigations" and to allow the IJ to "consider the results of the completed or updated investigations or investigations before issuing a decision granting or denying the relief sought." *Id.* at 4748 (emphasis added). Accordingly, in the event of a remand to the IJ, an order of removal becomes a final order under 8 U.S.C. 1101(a)(47)(B), and is subject to judicial review under 8 U.S.C. 1252, only following the conclusion of the proceedings after the remand. The Attorney General's regulation, combined with 8 U.S.C. 1101(a)(47)(B), thus makes clear that a decision of the BIA is not "final" for purposes of judicial review when it has remanded the case to the IJ for the completion of background check investigation as a prerequisite to the granting of relief.

The Third Circuit came to the same conclusion in *Vakker* v. *Attorney General*, 519 F.3d 143 (2008), petition for cert. pending, No. 08-5 (filed June 12, 2008), where it determined in analogous circumstances that an order of the BIA that remanded the case to the IJ was not a final order of removal. The court of appeals explained: "Ordinarily, when the BIA remands removal proceedings to the IJ pursuant to 8 C.F.R. §[] 1003.47(h)"—a regulatory companion to 8 C.F.R. 1003.1(d)(6)—"the 'final order' in the removal proceedings is the IJ's order following remand." 519 F.3d at 147 (citing *In re Alcantara-Perez*, 23 I. & N. Dec. 882 (B.I.A.

2006)). And the court noted that "[t]he regulations themselves are fairly clear in this regard," pointing to the statement in 8 C.F.R. 1003.1(d)(6) that the BIA "*shall not issue a decision affirming or granting*" relief prior to the completion of a background investigation. 519 F.3d at 147 n.3.[8]

The court of appeals erred in holding that the BIA's order was a "final order of removal." The court correctly determined that the BIA had entered an "order of removal" because it adopted the IJ's finding that petitioners were removable. Pet. App. 4a-5a. But it erred in concluding that the order was "final" in light of the BIA's remand of the case to the IJ for additional proceedings. Instead of turning to 8 U.S.C. 1101(a)(47) and 8 C.F.R. 1003.1(d) to assess the finality of the BIA's order, the court of appeals looked to *Forney* v. *Apfel*, 524 U.S. 266 (1998), and stated that an order is final when "the original decision on the only question open to judicial review is 'final.'" Pet. App. 3a-4a. But *Forney* involved a statute addressing the finality of a *district court* decision for purposes of appellate review under 28 U.S.C. 1291, not the finality of an *agency* decision, and the *Forney* Court recognized that an agency decision remanding a case would provide "less closely analogous circumstances" and may not be judicially reviewable. See 524 U.S. at 269, 271-272.

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[8] In *Yusupov* v. *Attorney General*, 518 F.3d 185 (3d Cir. 2008), the Third Circuit held that a BIA decision that remanded to the IJ for a background check under 8 C.F.R. 1003.1(d)(6) did constitute a "final order of removal," but it explained that, unlike in *Vakker*, the aliens in *Yusupov* had been *denied* withholding of removal, so that "[n]othing in their background checks could affect" their eligibility for relief. 518 F.3d at 196 n.19.

An agency's decision is final when it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted). The BIA's decision here did not mark the end of the agency's process, and petitioner's rights were not conclusively determined. As the BIA has made clear, every proceeding before the IJ on remand could have some effect on the alien's eligibility for relief from removal, because the IJ re-acquires jurisdiction over the entire case, is required to consider the relevance of any new evidence, and may entertain a motion to reopen for consideration of a new form of relief. See *In re M-D-*, 24 I. & N. Dec. 138, 141-142 (B.I.A. 2007). If the IJ denies withholding relief on remand, the alien can then appeal that ruling to the BIA (and renew any other challenges previously rejected by the BIA), and then seek judicial review in a single petition for review of all issues finally resolved against him by the BIA. That approach promotes the interests of both administrative and judicial efficiency, and therefore reinforces the conclusion that the BIA's remand decision was not a "final" order. The court of appeals thus should have determined that the BIA's order was non-final.

Because the court of appeals lacked jurisdiction over petitioner's claim, this Court does as well. At the very least, the presence of this substantial jurisdictional question makes this case a poor vehicle to consider the question petitioners present regarding the scope of 8 U.S.C. 1252(a)(2)(D).

b. Second, even if the BIA's order was a "final order of removal," the court of appeals correctly determined

that it lacked jurisdiction over petitioner's fact-bound claim because it does not raise a "question[] of law."

Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant did not "demonstrate[] to the satisfaction of the Attorney General * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing," 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 3-4, 9-10), his petition for review challenged a determination that his asylum application was untimely and that he failed to demonstrate changed circumstances or extraordinary circumstances to justify that untimely filing. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

The court of appeals correctly held that petitioner's challenge to the BIA's fact-bound, discretionary determination does not raise a "question[] of law." As the court of appeals explained, "Section 1252(a)(2)(D) does not restore jurisdiction when, as in this case, the governing rules of law are undisputed." Pet. App. 10a. The court noted that "both the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." *Id.* at 6a. And it explained that the agency made two findings—"that [petitioner] had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material"—neither of which "rests on or reflects a legal mistake," because "[t]he first is a conclusion of

fact and the second is an application of law to fact." *Ibid.*

The court of appeals correctly rejected the view that any "applications of law to fact" raise a "question[] of law," reasoning that "no administrative case can be decided without applying some law to some facts." Pet. App. 8a. If petitioner's fact-bound challenge to the Attorney General's discretionary determination raised a "question[] of law," the court explained, then "every error an agency can make is in the end one of 'law,'" and that would "erase[]" 8 U.S.C. 1158(a)(3) and other jurisdictional limitations "from the statute books." Pet. App. 6a-7a; see *id.* at 8a (noting that petitioner's reading of Section 1252(a)(2)(D) would "vitiate[] all clauses in the statute, including § 1158(a)(3), that limit judicial review of particular classes of decisions"); see also, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006). Instead, the court explained, a claim raises a "question[] of law" when "a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." Pet. App. 7a.

Moreover, regardless of whether an "application of law to fact" can raise a "question[] of law," petitioner did not raise a "question[] of law" because the question whether he demonstrated "changed circumstances" or "extraordinary circumstances" to justify an untimely filing is a question committed to the Attorney General's discretion. Such a discretionary determination does not raise a "question[] of law" within the meaning of 8

U.S.C. 1252(a)(2)(D). The text of the INA entrusts the "extraordinary circumstances" or "changed cir-cumstances" determination to the discretion of the Attorney General: it says that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion." *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981). And the phrase "to the satisfaction of the Attorney General" demonstrates Congress's expectation that the Attorney General's assessment "entails an exercise of discretion." *Sukwanputra*, 434 F.3d at 635.[9]

A challenge to a discretionary determination by the Attorney General does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). That is precisely the type of claim over which Congress intended to withhold juris-

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[9] Contrary to petitioner's suggestion (Pet. 29 n.14), the issuance of regulations interpreting 8 U.S.C. 1158(a)(2)(D) does not make a determination as to whether an asylum applicant demonstrated "changed circumstances" or "extraordinary circumstances" non-discretionary. See, *e.g.*, 8 C.F.R. 1208.4(a)(2)(i)(B) (alien has burden of proving "to the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline"). Nor does the INS's internal training manual for asylum officers, which in any event is not binding on the BIA or this Court. See, *e.g.*, *In re Tijam*, 22 I. & N. Dec. 408, 416 (B.I.A. 1998). Those materials are intended to guide agency adjudicators in making discretionary determinations that are unreviewable under 8 U.S.C. 1158(a)(3) to avoid wide disparities in their application; it would be improper to interpret them as having the quite different effect of enabling judicial challenges to such decisions notwithstanding the express statutory limitation on such review. Cf. *Sandin* v. *Conner*, 514 U.S. 472, 482-83 (1995) (prison administrative regulations should not be construed as creating judicially enforceable liberty interests under the Due Process Clause).

diction under 8 U.S.C. 1252(a)(2)(D). Congress added *the exception for "constitutional claims or questions of* law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and the *St. Cyr* Court clearly differentiated between questions of law and discretionary decisions. *Id.* at 298 (noting that Court was not addressing a claim of "any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum"); *id.* at 314 n.38 ("[T]his case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not * * * an objection to the manner in which discretion was exercised."). The legislative history of the REAL ID Act confirms that Congress did not intend to permit review of such determinations. See, *e.g.*, H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (Section 1252(a)(2)(D) was intended "to permit judicial review over those issues that were historically reviewable on habeas," namely "constitutional and statutory-construction questions, *not discretionary or factual questions*" (emphasis added)). Indeed, reading "questions of law" to encompass determinations such as those at issue here would have the opposite effect of what Congress intended in committing certain determinations to the discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("protecting the Executive's discretion from the courts" could "fairly be said to be the theme of the legislation" in which Congress added not only 8 U.S.C. 1252(a)(2)(A)-(C) but also 8 U.S.C. 1158(a)(3)). Because petitioner's claim is a fact-bound challenge to a determination that is in any event discretionary, it does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore

correctly determined that it lacked jurisdiction to consider it.[10]

c. Third, even if there were jurisdiction, petitioner could not show that the agency erred in refusing to consider his untimely asylum application. First, petitioner has not demonstrated any legal error in the BIA's conclusion. As the court of appeals correctly determined, the BIA applied the correct legal standard in determining whether petitioner met his burden of justifying his untimely filing: "[B]oth the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." Pet. App. 6a. Indeed, the court of appeals noted, "the governing rules of law are undisputed" in this case. *Id.* at 10a.

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[10] Although petitioner included, as one of his questions presented (Pet. i), "[w]hether the Constitution guarantees review in some court by some means over petitioner's claims regarding the asylum filing exceptions," he failed to present any argument in support of the claim that the Constitution requires a judicial forum to consider his challenge to the BIA's timeliness determination. That contention is therefore waived. Moreover, that claim was not pressed or passed on below, and thus it should not be considered by this Court. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992)

To the extent that petitioner suggests that the phrase "question[] of law" should be interpreted to permit judicial review of his fact-bound challenge so as to "avoid any need to consider constitutional objections to § 1252(a)(2)(D)," the court of appeals correctly rejected that argument. Pet. App. 8a-9a. As the court of appeals explained, "the Constitution itself allows Congress to create exceptions to the jurisdiction of the federal courts," and "[p]rovisions foreclosing judicial review of particular administrative decisions are common." *Id.* at 8a. Moreover, as explained above, the court of appeals' determination that it lacked jurisdiction here is fully consistent with this Court's conclusions in *St. Cyr*, because this Court made clear that its constitutional concerns did not extend to the agency's discretionary determinations. See pp. 19-20, *supra*.

Further, petitioner has not shown that the BIA's determination that he failed to adduce facts sufficient to show changed or extraordinary circumstances was unsupported by substantial evidence. As the IJ explained, petitioner did not demonstrate, as a factual matter, that circumstances "changed" in Colombia in any meaningful way that would justify a late filing. Pet. App. 18a-19a. And the IJ found that there was "*no correlation* between [petitioner's] decision to file" his application and his alleged "changed circumstances." *Id.* at 18a (emphasis added). Moreover, the IJ found that petitioner was not operating under any legal disability that would constitute "extraordinary circumstances"; instead, "[t]he IJ found that [petitioner] had deliberately refrained from making a timely application for asylum." *Id.* at 6a. The BIA adopted the IJ's decision, including those factual findings. *Id.* at 29a. If the court of appeals were to consider the timeliness question—and if it could review the BIA's factual determinations at all—it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the BIA's fact-specific conclusions were not supported by substantial evidence.

Moreover, an untimely asylum application must be filed within a reasonable period of time in light of the circumstances justifying the late filing, 8 C.F.R. 1208.4(a)(4)(ii) and (5), which petitioner's likely was not. And even if petitioner could establish that his three-year filing delay was "reasonable," that would only mean that the untimely application "*may* be considered." 8 U.S.C. 1158(a)(2)(B) and (D) (emphasis added). Thus, there is

little prospect that resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) would affect the outcome of this case in any event. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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